Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	CC Docket No. 92-90
	)	
	)	
	)	
	)	
	)	

COMMENTS

Several telephone companies subject to Sections 222 and 227 of the Communications Act of 1934, as amended, and their affiliates (hereinafter, "Concerned Telephone Companies"),[1] by their attorneys, hereby oppose the Commission's "tentative conclusion" that consumers who consent to the use of their "Customer Proprietary Network Information" ("CPNI") nevertheless may not be marketed to by telephone if they join a "do-not-call" list.[2]

For the reasons explained below, this "tentative conclusion" is legally and constitutionally deficient, unfair to affected carriers, illogical, and confusing to consumers. So long as a consumer provides his or her consent to a carrier to use CPNI for marketing endeavors, no restrictions should apply regarding *how*

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[1] A list of the companies joining in these Comments is attached.

[2] *See Notice of Proposed Rulemaking and Memorandum Opinion and Order, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, CC Docket No. 92-90, FCC 02-250, rel. September 18, 2002, at Para.19. (Hereinafter, "*Notice*").

the carrier markets telecommunications-related and other products to the consenting consumer.

In reaching its "tentative conclusion," the Commission interprets the "interplay" between two distinct statutory provisions – Sections 222 and 227 of the Communications Act of 1934, as amended -- that, historically, bear little relationship with one another. The Commission proposes to remove any tension between them by placing greater weight on the telemarketing statute (Section 227), thereby rendering the CPNI statute (Section 222) subservient. This would be achieved by restricting a carrier -- customer consent notwithstanding -- from marketing by telephone if the customer had joined, or subsequently joins, a telemarketing "do-not-call" list.

The "Tenetative Conclusion" is Legally Deficient

The importance of the presence of customer "consent" under the CPNI rules cannot be overemphasized because the telemarketing statute does *not* restrict "telephone solicitations" if the called party has given his or her "prior express invitation or permission" to be contacted.[3] Accordingly, consent given by a customer under the CPNI rules renders Section 227 constraints inapplicable. At a minimum, if the Commission believes this is not the case, it should explain how its telemarketing regulations apply to carriers possessing their customers' consent to market without restriction based on their CPNI.

The "Tentative Decision" is Constitutionally Deficient

The Commission seeks comment on whether its "tentative conclusion," if adopted, would pass constitutional muster under *Central Hudson Gas & Elec.*

Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557 (1980) (hereinafter, "*Central Hudson*"), which the Commission relied upon in adopting its revised CPNI rules[4] and cites herein as governing precedent.[5] The answer here lies in the negative because the Commission is proposing to restrict dramatically the means by which a carrier could market to its consenting customers. The Commission thus would be limiting commercial free speech by visiting undue hardship on both carriers and their customers, in violation of their respective rights.

Central Hudson sets out a four-part test,[6] asking first whether the speech in question concerns illegal activity or is misleading, in which case the government may freely regulate the speech. If the speech is not misleading and does not involve illegal activity, the remaining three elements are applied to the government's proposed regulation. The second prong of *Central Hudson* examines whether the government has a substantial interest in regulating the speech. Third, the government must show that the proposed restriction on commercial speech directly and materially advances that interest. And, finally, the proposed regulation must be narrowly tailored, such that the restriction

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[3] *See* 47 U.S.C. 227 (a) (3)-(4).

[4] *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115, 96-149, 00-257, FCC 02-214 (rel. July 25, 2002).

[5] *Notice*, at Para. 12.

[6] 447 U.S. at 564-65.

reflects a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition."[7]

Applying *Central Hudson*, there is no issue involving speech that pertains to an illegal activity or is misleading, which brings into play the remaining three elements. Assuming that the government has a substantial interest in regulating the methods by which commercial free speech is exercised and, in addition, that the restriction proposed by the Commission would directly and substantially further that interest, it remains, then, whether the restriction is sufficiently tailored, such that it reflects a careful consideration of the "costs and benefits associated with the burden" that would result from the regulatory approach.

It should be evident that the latter requirement cannot be satisfied. The breadth of the proposed limitation would restrict a carrier from engaging in a lawful activity for which the customer already has given, or subsequently may provide, his or her consent. And, it simply is not acceptable under *Central Hudson* to bar the telemarketing option altogether, as the Commission proposes, because there remain some alternative methods of marketing available to the carrier, namely, the use of "direct mail, e-mail, etc." [8] Accordingly, the proposed restriction fails under *Central Hudson* because it is not sufficiently narrow in scope. It may be, as the Commission indicates, an approach that "does not

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[7] *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 417 (1993) (Internal quotation marks omitted).

[8] *Notice*, at Para. 19.

render a consent under Section 222 a nullity,"[9] but it most surely minimizes the significance of that consent to the detriment of carriers and customers alike.

The Commission fails to consider the alternative of amending its CPNI and/or its telemarketing rules "to exempt" customers joining a "do-not-call" list from the operation of the restriction, if they consent to the use of their CPNI for the marketing of communications-related or other products. And the Commission also fails to consider the alternative of allowing carriers to include in their CPNI notifications and consents language to the effect that "customer consent to the use of its CPNI will supersede any existing or future customer subscription to a "do-not-call" list." Such "notice" would afford customers ample opportunity to accept or reject telemarketing by the carrier; and it never could be said that any carrier telemarketing directed at the customer was "unsolicited," or that the consent leading to telemarketing was "uninformed." Either of these more tailored approaches would serve to establish a more appropriate balance between individual privacy concerns, on the one hand, and commercial free speech, on the other hand. Telemarketing by the carrier could proceed and commercial speech would not suffer to the extent it would if the approach reflected in the Commission's "tentative conclusion" were adopted.[10]

The "Tentative Decision" is Unfair and Illogical

In addition to being unfair to carriers that undertake the effort and incur the expense to obtain consent to use their customers' CPNI by eliminating what

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[9] *Id.*

otherwise could be a potentially cost-effective approach to marketing, the Commission's "tentative conclusion" is illogical. Logic strongly suggests that a customer's "consent" to the use of his or her CPNI for marketing purposes should override a subscription to any "do-not-call" list, which most likely was joined to counter *unknown* telemarketers offering a myriad of *unknown* products and services with respect to which no customer consent was ever asked or given.[11] Thus, for consenting customers who know the identity of their carriers and who understand the nature of the goods to be marketed to them, it is illogical to assume that their joining a "do-not-call" list was intended to nullify their Section 222 consents.[12]

Under the revised CPNI rules, specifically, Section 64.2008 (E), a customer is free to withdraw consent to the use of his or her CPNI, *i.e*., "opt-out," *at any time*, and carriers must immediately honor a customer's withdrawal-of-consent demand. Thus, if a customer, in subscribing to a "do-not-call" list, wished to revoke permission *previously* granted with regard to the use of CPNI for marketing, he or she could easily contact the carrier to withdraw that consent. The customer would experience no hardship in this undertaking. However, a

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[10] In all events, as explained below, the consumer is free to withdraw its consent with regard to CPNI use at any time by contacting the carrier, so that a carrier's ability to telemarket to the consumer is not fixed and immutable.

[11] Moreover, a consumer's request or demand to be placed on a "do-not-call" list usually occurs in response to a *particular* telemarketing call or seller. Therefore, it would be wrong to assume that any such consumer request or demand is intended to reach, or should apply to, any entity other than the instigating seller.

[12] Carriers obtain their customers' "consent" either via the "Opt-in" or "Opt-out" method. Therefore, no distinction should be made between these for purposes of considering the telemarketing rules. The Commission, at Paragraph 19 of the *Notice*, indicates that "Opt-in" consent is "express," implying that "opt-out" consent is something less in stature or validity. The Concerned Telephone Companies believe this to be an inappropriate distinction to make and, accordingly, submit that "consent" is "consent" whether obtained by either method.

customer who *first* joins a "do-not-call" list and later is approached by his or her carrier – either employing the "Opt-in" or "Opt-out " method to obtain consent for CPNI use – would be unable to consent to being telemarketed to by the carrier under the Commission approach reflected in its "tentative conclusion," unless the customer were to choose to be removed from the "do-not-call" list, which would negate altogether the benefits of joining such a list. This surely would result in significant "customer confusion" and pose hardship because it would force customers to choose between being telemarketed to by its carrier and everyone else, or by no one.

The Concerned Telephone Companies understand the Commission's desire to allay any concern that Sections 222 and 227 of the Act conflict with one another. However, the "tentative conclusion" reached by the Commission with respect to eliminating conflict simply goes too far. As noted, it fails to take into account less intrusive approaches that would result in imposing less onerous constraints on commercial speech.

In view of the foregoing, the Commission is requested to reconsider its "tentative conclusion" and, instead, find that a customer's joining a "do-not-call" list does not revoke, or otherwise foreclose, the customer's consent, if given, to

have his/her CPNI used by the serving carrier for telemarketing.

Respectfully submitted,

/s/ D. J. Elardo
Marci Greenstein
Donald Elardo

KRASKIN, LESSE & COSSON
2120 L Street, NW, Suite 520
Washington, DC 20037
(202) 331 – 4012

COUNSEL FOR THE
CONCERNED TELEPHONE
COMPANIES

Dated: December 9, 2002

ATTACHMENT
(1 of 2)

Concerned Telephone Companies and Affiliates

Adams NetWorks, Inc.
Adams Telcom, Inc.
Adams Telephone Cooperative
Adams TelSystems, Inc.
Armour Independent Telephone Co.
Armstrong Telephone Company
Big Sandy Telecom Inc.
Bluestem Telephone Company
Bridgewater-Canistota Telephone Co.
Chautauqua & Erie Telephone Corporation
China Telephone Co.
Chouteau Telephone Company
Columbine Telecom Company
C-R Telephone Company
Ellensburg Telephone Company
Fremont Telecom
GTC Inc dba GT Com Inc.
HTC, Inc.
Kadoka Telephone Co.
Ligonier Telephone Company
Ligtel Communications
Maine Telephone Co.
Marianna & Scenery Hill Telephone Company
Mid-Century Telephone Company
Northland Telephone Company of Maine, Inc.
Odin Telephone Exchange Inc.
Peoples Mutual Telephone Company
Ringgold Telephone Company
Ringgold Telephone Long Distance
RTC Communications
RTC Internet
RTC TelVision
Sandhill Communications
Sandhill Telephone Cooperative
Sidney Telephone Company
Standish Telephone Co.
STE/NE Acquisition Corp. d/b/a Northland Telephone Company of Vermont
The Columbus Grove Telephone Company
Sunflower Telephone Company Inc. (Colorado)
Sunflower Telephone Company, Inc. (Kansas)

ATTACHMENT
(2 of 2)

Taconic Telephone Corporation
The El Paso Telephone Company
The Orwell Telephone Company
Twin Lakes Telephone Cooperative
Union Telephone Company of Hartford
West River Telecommunications Cooperative
Yates City Telephone Company
YCOM Networks, Inc.

CERTIFICATE OF SERVICE

I, Donald J. Elardo, hereby certify that copies of the foregoing "Comments"were mailed, first-class, postage prepaid, on December 9, 2002, to:

Marlene H. Dortch, Secretary
Federal Communications Commission
445-12th Street SW
TW-A325
Washington, DC 20554
(Electronically filed)

Kelli Farmer
Federal Communications Commission
Room 4-C740
445-12th Street SW
Washington, DC 20554
(Four copies)

/S/ D. J. Elardo
Donald J. Elardo